In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 145

THE HONORABLE MICHAEL L. IGOE, UNITED STATES DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Orlando P. Colamatteo was indicted for the wilful attempted evasion of his 1954 individual income tax, in violation of Section 7201 of the Internal Revenue Code of 1954. His indictment was dismissed in 1961, on grounds not here relevant, but the dismissal was

vacated by the court of appeals and the case was remanded for trial. *United States* v. *Colamatteo*, 312 F. 2d 154.

Subsequently, Colamatteo sought to waive trial by jury on the ground that members of the public were biased against persons of Italian descent (R. 105). The government, relying upon Rule 23(a) of the Federal Rules of Criminal Procedure, refused to consent to the waiver. The district judge before whom the case was set for trial—petitioner in this Court—then "overruled" the government's "objection to the filing of a waiver of jury trial" and ordered the case to proceed to trial immediately without a jury (R. 107). The government refused to proceed to trial without a jury (R. 113-114). The judge thereupon dismissed the case "for want of prosecution" (R. 114). On the government's petition for a writ of mandamus, the court of appeals directed that the case be reinstated and set for trial. It held that a defendant in a criminal case has no constitutional right to be tried without a jury over the government's objection, and that the requirement of Rule 23(a) that the government's consent be obtained before a jury waiver can become effective is supported by this Court's opinion in *Patton* v. *United States*, 281 U.S. 276, 312.

The question presented by this case is also before the Court, although in different circumstances, in *Singer* v. *United States*, No. 42, certiorari granted, April 20, 1964. We suggest that disposition of the present petition await the decision in *Singer*.*

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JULY 1964.

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* Petitioner's subsidiary contention (Pet. 15-16) is that jeopardy attached in Colamatteo's trial when the government refused to proceed without a jury, so that no retrial may be ordered in any event. This argument is without merit since no jury had been empaneled, no witnesses had been sworn, and no evidence had been taken. See *Hunter* v. *Wade*, 169 F. 2d 973, 975 (C.A. 10), affirmed, 336 U.S. 684.

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